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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 658

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5,
CHARLES SCHREIBER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

LEON B. LAMFROM,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 658

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, TILE LAYERS HELPERS UNION, LOCAL No. 47, AND HERBERT SEBASTIAN.

STATEMENT AS TO JURISDICTION.

This case is one in which the validity of the Statutes of the State of Wisconsin, to wit: Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935 formerly and at the time this case was tried in the trial court denominated Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, is drawn in question upon the grounds that the said statutes, as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judgment of the Supreme Court of the State of Wisconsin deprives the appellant of liberty or property without due process of law and denies to the appellant the equal protection of the laws.

The statutes above enumerated are popularly known as the Labor Code of the State of Wisconsin, which was passed by the Legislature of the State of Wisconsin in 1931.

At the time the Supreme Court of the State of Wisconsin handed down its opinion in this case, which is not yet officially reported but is reported in 268 N. W., at page 270, it also handed down its opinion on the constitutionality of said statutes in the case of *American Furniture Company* v. *I. B. of T. C. & H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, et al.*, reported in 268 N. W. at page 250, in which opinion it held the said statutes constitutional at pages 260 to 262. The opinion in this case, the report of which shows the opinion in the *American Furniture Company* case, both opinions having been handed down on June 29, 1936, did not go into the validity of said statutes for the reason that they had been held constitutional in the opinion in the *American Furniture Company* case. In rendering its opinion in this case, the court divided, four judges concurring with Mr. Justice Fairchild, who wrote the majority opinion, and two judges dissenting, the dissenting opinion having been written by Mr. Justice Fowler. The minority opinion in this case by Mr. Justice Fowler, found in 268 N. W., at page 274, goes into the question of whether the failure of the court to grant a judicial remedy in this case was a violation of the Constitution of the United States and holds that it was.

On the petition of appellant for a rehearing, the court was asked, although it had held the statutes valid in the *American Furniture Company* case, to pass directly upon the validity of these statutes in this case, and in the opinion on the appellant's motion for rehearing, found reported in 268 N. W., at page 872, handed down September 15, 1936, the court stated through Mr. Justice Fairchild:

> "Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by sections 268.18 to 268.30, Stats.

1933, now sections 103.51 to 103.63, Stats. 1935, exists, that sections 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and Federal Constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adversely to the contentions of plaintiff in the case of *American Furniture Co.* v. *I. B. of T. C. and H. of A. etc.*, 268 N. W. 250, decided at the same time.

"Motion for rehearing denied, with $25 costs."

The statutes enumerated are in summary as follows:

Section 103.51 is entitled "Public policy as to collective bargaining," and provides, in substance, that negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes; that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing; that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 103.52 is entitled " 'Yellow-dog' contracts" and is, in substance, to the effect that such contracts are contrary to public policy.

Section 103.53 is entitled "Lawful conduct in labor disputes" and enumerates acts which, performed singly or in concert, shall be legal; among others, giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute; ceasing to patronize or to employ any person or persons. Said section further provides that the doing in concert of any or

all of the acts specified shall not constitute an unlawful combination or conspiracy; that peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal; and that no court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts.

Section 103.54 is entitled "Responsibility for unlawful acts" and provides, in substance, that no officer or member of any association or organization shall be held responsible or liable for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence of the doing of such acts or ratification of such acts after actual knowledge thereof.

Section 103.55 is entitled "Public policy as to labor litigation" and states that the public policy is not to have injunctions issued except upon notice and hearing and not upon affidavits, in that the issuance of injunctive relief is usually irreparable to the opposing party.

Section 103.56 is entitled "Injunctions: conditions of issuance; restraining orders" and provides that no court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court and except after findings of all the following facts by the court or judge or judges thereof:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53, which defines lawful conduct in labor disputes;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

Said section also provides for notice of hearing and for the issuance of a temporary restraining order for five days under conditions set forth therein, and for adequate security.

Section 103.57 is entitled "Clean hands doctrine" and, in fact, provides that no relief shall be granted to any complainant who has failed to comply with any legal obligation which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration.

Section 103.58 is entitled "Injunctions: contents" and provides for the procedure for filing of findings of fact prior to the issuance of a restraining order or injunction, and provides further that the restraining order or injunction shall include only a prohibition of such specific act or acts as may be expressly complained of and as are expressly included in the findings of fact, and shall be binding only upon the parties to the suit, their agents, servants, em-

ployees and attorneys, or those in active concert and participation with them.

Section 103.59 is entitled "Injunctions: appeals" and provides for the expedition of appeals in the appellate court.

Section 103.60 is entitled "Contempt cases" and provides for a speedy and public trial by jury, except in case of direct contempt committed in the presence of the court or so near thereto as to interfere directly with the administration of justice.

Section 103.61 is entitled "Punishment for contempt" and sets forth as punishment for contempt a fine not exceeding twenty-five dollars or imprisonment not exceeding ten days in the jail of the county, or both.

Section 103.62 is entitled "Definitions" and provides as follows:

> "When used in sections 103.51 to 103.63, and for the purposes of these sections:
>
> "(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in subsection (3) of 'persons participating or interested' therein (as defined in subsection (2)).
>
> "(2) A person or association shall be held to be a person participating or interested in a labor dispute

if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employes engaged in such industry, trade, craft, or occupation.

"(3) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe."

Section 103.63 is entitled "Severability of provisions" and is to the effect that if any provision of sections 103.51 to 103.63 or the applications thereof to any person or circumstance is held invalid, the remainder of said sections and the application of such provisions to other persons or circumstances shall not be affected thereby.

This case is also one in which, by the decision of the Supreme Court of the State of Wisconsin denying relief to the appellant from picketing and other methods of interference with appellant's business, appellant is deprived of liberty or property without due process of law and is denied the equal protection of the laws in that appellant has no judicial remedy to protect such constitutional rights.

The final decision of the Supreme Court of the State of Wisconsin, entered in the last resort in all causes in the State of Wisconsin in which this decision could be had, is in favor of the statutes quoted above, as so construed, and in favor of the denial to the appellant of a remedy to protect his constitutional rights of liberty and property under Section 1 of the Fourteenth Amendment to the Constitution of the United States and to enjoy the equal protection of the

laws under the same section, the effect of said decision being to deprive the appellant of liberty or property without due process of law and to deny to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws.

Therefore, in accordance with the rules of the Supreme Court of the United States, the petitioner respectfully petitions this court that this case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit; Section 237 of the Judicial Code, also known as U. S. C. A. Title 28, section 344a, a review could be had in the Supreme Court of the United States by Writ of Error as a matter of right, and that this is also a case in which the denial of a remedy by the Supreme Court of the State of Wisconsin under Section 1 of the Fourteenth Amendment to the Constitution of the United States is a judicial decision of the Supreme Court of the State of Wisconsin which operates to deprive the appellant of liberty or property without due process of law and denies to appellant the equal protection of the laws.

The said Supreme Court of the State of Wisconsin in the last resort rendered its decision herein on June 29, 1936, and an opinion rendered on September 15, 1936, by the Hon. Edward T. Fairchild, Associate Justice of said Supreme Court of the State of Wisconsin, denied a re-hearing.

Said opinion of the Supreme Court of the State of Wisconsin in the last resort in all causes in the State of Wisconsin has not yet been officially reported but is unofficially reported in Volume 268 of the Northwestern Reporter, at page 270, and the opinion denying the motion for re-hearing is reported in Volume 268 of the Northwestern Reporter, at page 872.

This is a case in which the appellant (plaintiff in the trial court, the Circuit Court of Milwaukee County, Wisconsin)

sought an injunction to enjoin the appellees (defendants in the trial court), two labor unions and individually named officers of such labor unions, from coercing the appellant to give up his right to work in his own business, that of a small tile layer-contractor, from attempting to molest, intimidate or coerce any of the contractors, architects, owners, or other persons seeking to transact business with the appellant, from representing or stating that the appellant is unfair to organized labor, and from interfering in any unlawful manner with the appellant and the family of the appellant at his residence or at any place where the appellant and his family may lawfully be.

Appellant at the time of the trial in the spring of 1936 was thirty-six years of age, married, had four children, resided in Milwaukee County, Wisconsin, and was engaged in a small tile contracting business. He is a man of considerable education and experience, having been engaged in electrical and civil engineering work and in the installing of equipment in steel mills and gas plants; also having worked as an industrial engineer. In 1930 he went to Florida because of the condition of the health of members of his family. He had to earn a living so he hired out as a day laborer and did tile work in Florida for nine or ten months. In 1932 he started in a very small way in the tile contracting business in Milwaukee. His usual crew in his operations was a man and his helper. Senn himself worked continuously in this business, setting tile. He just about made a living out of the business. For instance, in 1935 he made about fifteen hundred dollars, seven hundred fifty dollars of that being attributable directly to the fact that he labored in his business with his own hands and tools, setting tile. He has invested in his business seven hundred fifty to eight hundred dollars. He has no income except what he gains from his tile business.

In March, 1935, the appellee, Tile Layers Protective Union, Local No. 5, demanded that Senn sign a closed shop union contract, which contains Article III, reading as follows:

> "It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper, but that the installation of all materials claimed by the party of the second part listed under the caption "CLASSIFICATION OF TILE WORK" in this agreement shall be done by journeyman members of Tile Layers Protective Union Local No. 5."

Senn said that he could not sign the contract unless Article III were eliminated because that would operate to deprive him of his right to make his own living and actually make it impossible for him to continue in his tile contracting business. He was willing to sign the contract if Article III were eliminated. The union refused to eliminate said Article III and commenced picketing appellant's home, where he maintains his shop, in December, 1935, and has ever since continued to picket him and follow him around town in going to and from his jobs. The union also sent letters to architects and contractors in which they included a list of fair contractors and stated that if anyone outside of said list (in which category the appellant fell) was awarded tile work, they would picket such jobs, contractors' or architects' offices.

Appellant's claim was and is that he has a constitutional right to work with his own hands and tools in a lawful occupation, and that to deny him a remedy against the appellees, who were picketing and otherwise molesting and damaging him, would be in effect to deprive him of liberty or property without due process of law and deny him the equal protection of the laws.

The appellees sought to justify their conduct under the so-called Wisconsin Labor Code by maintaining that there existed between Senn, the appellant, and the appellees a labor dispute and that the sections of said so-called Wisconsin Labor Code, Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, at the time of the trial being Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, were in effect a constitutional legislative prohibition upon the court to grant Senn any relief; that the picketing and other activities were carried on for the benefit of the unions as they saw their benefits, and that the situation thus created in the so-called labor dispute left Senn in the position of one who is damaged but has no legal remedy.

The trial court in its decision followed this theory of the appellees, and, denying appellant the relief requested, held that Article III, which would require the appellant to cease working as a tile layer, was a lawful rule, its purpose being to ameliorate the condition of the members of the union.

The constitutional questions involved were raised, argued and considered by the trial court, but the trial court decided adversely to the appellant and held that the statutes involved were in all respects valid, both as to the Constitution of the State of Wisconsin and the Constitution of the United States. These constitutional questions were raised at the close of the testimony and on the oral arguments before the decision of the court, and the reasons were given for the contention that said statutes were invalid. The court duly considered these arguments and decided that the statutes and each of them were in all respects constitutional and valid.

The appellant, under the practice prevailing under the code of procedure in the State of Wisconsin, proposed that the court make findings of fact and conclusions of law in writing, in which the court would find as a conclusion of law

that if the court were not to grant the relief asked for by the appellant against the acts of the appellees, it would be a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which, under the conditions in this cause, guarantees to the appellant a fundamental right to work with his own hands and tools in a lawful business without the unlawful interference and hindrance by others.

From the judgment of the trial court denying the appellant the relief prayed for, the appellant appealed to the Supreme Court of the State of Wisconsin, where the judgment of the trial court was affirmed and thereafter a motion of appellant for rehearing denied.

The said Supreme Court of the State of Wisconsin was the last resort in the State of Wisconsin.

In its opinion and in its opinion on the motion for rehearing, the Supreme Court of the State of Wisconsin passed on the constitutional questions raised, which were set forth in the briefs of the appellant in that court and which were argued in the oral arguments before the said court.

The Wisconsin Labor Code, consisting of Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, is an act which affects employers and employees and their respective rights and the rights of labor unions throughout the State of Wisconsin in their employment relations and otherwise, and it substantially affects all the citizens of the State of Wisconsin in respect to their constitutional rights and remedies in such relationships.

The decision rendered by the Supreme Court of the State of Wisconsin was the final decision made by the highest Court of the State by which such decision could have been made.

Some of the cases which the appellant believes are in support of his position and which will influence the decision of this court are as follows:

New York ex rel Bryant v. *Zimmerman*, ~~268~~ 278 U. S. 63;
Truax v. *Corrigan*, 257 U. S. 312;
Coppage v. *Kansas*, 236 U. S. 1.

Opinions of the majority and minority and the opinion on the motion for rehearing of the Supreme Court of the State of Wisconsin are hereto appended, reference to which may be necessary to ascertain the grounds of the judgment appealed from. The opinion of the Supreme Court of the State of Wisconsin on appellant's motion for rehearing must be read in connection with the opinion of the court in the case of *American Furniture Company* v. *I. B. of T. C. & H. of A., etc.*, 268 N. W. 250, at pages 260 to 262, both this case and the *American Furniture Company* case having been decided on the same day and the consideration of the statutes being involved in the opinions in both cases.

The application for appeal to the Supreme Court of the United States is presented on this 7th day of December, 1936.

LEON B. LAMFROM,
Attorney for Appellant.

EXHIBIT "A".

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1936

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PAUL SENN, *Appellant*,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, *et al.*, *Respondents*.

Appeal from a judgment of the circuit court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. *Affirmed.*

Suit in equity begun on the 27th day of December, 1935, seeking to enjoin two labor unions and certain individuals who were officers of the unions from coercing the plaintiff to refrain from engaging himself in the actual work of a tile layer or helper, the plaintiff being a contractor, and for other supporting relief. Judgment was entered in favor of defendants April 3, 1936, denying the injunction prayed for in the complaint.

The action is for a permanent injunction restraining defendants from interfering with or coercing the plaintiff in his business as a tile contractor. In such business he works with his own hands with tools of the trade, and employs one or two helpers not members of either of the defendant unions. He has no contractual relations with the defendants. The important facts appear in the findings by the trial court. The case was tried to the court and its findings include the following facts: The residence of the plaintiff and of the individual defendants. The organization of the unions with their business address, and the relation of the individual defendants to the unions; that the plaintiff for approximately four years conducted the business of a tile contractor in the city of Milwaukee; that he has now a show room in which he displays samples of tile; that he has, at times, employed one or two tile layers and helpers, depending upon the amount of work he has contracted to do at a given time; that he takes subcontracts for the installment

of tile; that none of his employees were at any time members of either union; that the defendants desired the plaintiff to unionize his business and required of him the signing of a contract containing the following provisions, referred to as Article 3:

> "It is definitely understood that no individual member of a partnership or corporation engaged in the tile contracting business shall work with the tools or act as helper, but that the installation of all materials claimed by the party of the second part listed under the caption 'Classification of Tile Work' in this agreement shall be done by journeymen members of Tile Layers Protective Union Local No. 5."

that the plaintiff was willing to agree to the terms exacted by the unions with the exception of the conditions imposed by Article 3; that because of the refusal of the plaintiff, defendants caused the premises of the plaintiff to be picketed, the pickets carrying banners with the inscription "Unfair To Organized Labor;" that they caused the plaintiff to be followed from his place of business to the jobs so that the jobs might be picketed; that the defendants sent letters to architects and contractors requesting them not to patronize the plaintiff and stating that if they did so, they would be picketed; that certain contractors in the city of Milwaukee entered into an agreement governing wages, hours and working conditions with the defendant unions, and are classed as union contractors; that by virtue of the agreement with union contractors, the defendant unions secure for their members advantages in their wages, hours and working conditions; that such wages are higher than the wages paid by the plaintiff; that the tile industry is demoralized, and that the members of the defendant unions have been in competition with non-union tile setters and helpers in their effort to secure work; that for the purpose of enhancing the interest of their members, the unions have deemed it wise, in the protection of their rights in the prosecution of their trade, to require all employers agreeing to conduct a union shop to comply with "Article 3;" that plaintiff, by virtue of his status as an employer and contractor, is not entitled

to membership in the defendant unions; that the requirements of the unions that a tile setter shall be a journeyman tile setter, who shall have acquired his practical experience by virtue of an apprenticeship consisting of service as an apprentice for not less than three years precluded the plaintiff from membership in the unions; that the picketing has been peaceful and without any unlawful acts; that the defendants agreed in open court to refrain from following the plaintiff from his place of business to his jobs, and to refrain from sending any further letters to architects or contractors, and to refrain from indulging in any acts or conduct mentioned in those letters. The court then concluded as matters of law; first, that a labor dispute exists between the plaintiff and the defendants; second, that it is not unlawful for the defendants "to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of the facts involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace, or threat thereof." The third conclusion was to the effect that the defendants have not indulged in violence or fraud. The fourth, fifth and sixth conclusions are as follows:

> "That the agreement submitted by the defandants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.
>
> "That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.
>
> "That the plaintiff is not entitled to the relief prayed for in his complaint."

FAIRCHILD, *J.*

Appellant is engaged as a contractor in the tile setting business in Milwaukee. He conducts his business as a small concern, and in addition to hiring tile setters, he, himself performs services usually rendered by a journeyman or helper. It was established on the trial that appellant employed his brother approximately ten per cent of the time; that he entered into a partnership with William Neider, a former union journeyman who gave up his membership in the union to enter into the partnership, and also employed Arnold Holly, a suspended union member. From May, 1934, to May, 1935, out of a total of 1777 hours on jobs, appellant himself worked as tile setter 771 hours.

There were occasional conferences between appellant and the union officials before this contest developed. In March, 1935, a contract was submitted to appellant by the union, Article III of which requires him to refrain from performing the work which it is his custom to perform, and to agree that such work be done by journeymen members of the Tile Layers Protective Union, Local No. 5. The ultimate object of the negotiations on the part of the respondents was to secure the unionization of appellant's business. The appellant asserts that he is willing to comply with all requirements covered by the union contracts except those which require him to refrain individually from working as a tile setter or helper. The dispute arises over the respective contentions thus outlined. It will readily appear that there are elements involved in this controversy not present in the case of *American Furniture Co.* v. *I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee*, decided herewith. The demand here by the unions is for the appellant to conform to a definite wage scale prevalent on union jobs, and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent in the industry where union rules prevail. The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant

unions, because the practices sought to be prevented can so readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood, these craftsmen find it necessary to require employers to comply with the terms of Article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work.

The respondents insist upon their right to exert economic pressure against one who refuses to bring his shop up to union standards by refusing to agree to the union rules requiring the contractor to abstain from working with the tools of the trade, and on this, base their declaration that a labor dispute exists. There does not seem to be much occasion to question the existence of a dispute between the associations, which are committed to the protection of certain standards of wages and hours, with a contractor engaged in the same craft who proposes to work therein as a journeyman or a helper at a price and during hours that suit him individually and which are below the standard desired by the unions.

The respondents, by the use of the practice of picketing, seek to induce the appellant to abandon his methods and to conform to the union rules. The distinctions between one engaged in the tile setting business and one working as a journeyman or helper is apparent, and if the proposed contract is entered into by appellant, he will bind himhelf to respect the union classifications and distinctions. Appellant has declined to sign the suggested contract unless there be eliminated therefrom the provisions which require him to desist from working with his tools and his helping generally in the work of installing material. Respondents insist that the particular rule to which appellant objects is one in the furtherance of the legitimate interests of the members of the unions. In view of our decision in the *American Furniture Co. Case, supra,* and the cases there

analized in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft. There is no effort to induce or compel the appellant to do any unlawful thing. If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard. *American Furniture Co.* v. *I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, supra,* and cases there cited. No question exists as to appellant's right to conduct a non-union shop under any terms he chooses. An economic contest has developed. Each of the contestants is desirous of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents.

The legislature, in outlining the public policy of this state, has precluded him from an appeal to the courts for assistance until some unlawful act has become imminent, or something has occurred to start in motion the administration of equity rules, or the performance of the duties of policing. The respondents do not question that it is appellant's right to run his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the legislature for the purpose of enhancing their opportunity to acquire work for themselves and those whom they represent. The nature of the controversy is one in which the court and law enforcing officers can have no interest other than to preserve the equality of each contender before the law, and to require that each refrain from doing any unlawful act. Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or

annoyance. Frankfurter & Green, The Labor Injunction, p. 31.

The respondents act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up. As stated by respondents' counsel in their brief, "the public is free to accept or reject the appeal and plaintiff is free to perform all work he can get in whatever manner he wishes to perform it." He may work long hours. He may bid for contracts at a low figure based on low wages for himself and on long hours. In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours and improved working conditions, and the collision of the two sets of rights, the one in appellant, the other in the respondents, creates a labor dispute within the definition of the code. Each appeals to public opinion. If the trade turns from one to the other as a result of this dispute, the injury is incidental, *injura absque damno*.

It appears that when issue was first joined between the parties, considerable spirit was manifested on both sides and evidently acts occurred calculated to intimidate appellant and bring about a secondary boycott. The trial court said:

> "That because of their statements made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors, or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the court concludes that no unlawful acts will be committed or will be executed or continued."

The discretion of the trial court in determining that there is no occasion for a restraining order in the particulars suggested is well within the scope of duties imposed on it. We are of the opinion that no occasion exists for overruling the lower court in this particular, and in other respects the judgment is approved.

By the Court—Judgment affirmed.

EXHIBIT "B".

IN SUPREME COURT, STATE OF WISCONSIN.

JANUARY TERM, 1936.

No. 177.

PAUL SENN, *Appellant*,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5 *et al.*, *Respondents.*

FOWLER, J. (dissenting):

I dissent in this case for the reason that in my opinion the case is not within the labor code and for the further reason that if it is within the code the picketing involved should be enjoined because it is done to coerce the plaintiff into doing an unlawful act. My reasons for considering the case not within the code and for considering that picketing to coerce the doing of an illegal act will be enjoined, are given in my dissenting opinion in *American Furniture Co.* v. *I. B. of T. C. and H. of A. Chauffeurs, et al.*, decided herewith. In this connection I will only give my reasons for considering unlawful the act the defendants are seeking to coerce the plaintiff to do.

The picketing involved is done by the defendants for the purpose of coercing the plaintiff into signing a contract that is unlawful because it is in restraint of trade. Every contract in restraint of trade is illegal under the public policy of the state, as declared by sec. 133.01 Stats. A contract that restricts a promisor in the exercise of a gainful occupation is a contract in restraint of trade. Every such contract is invalid if the restraint is unreasonable. Every restraint in such a contract is unreasonable if it is greater than is necessary for the protection of the persons for whose benefit the restraint is imposed or if it imposes undue hardship on the person restricted. *Milwaukee Linen & Supply Co.* v. *Ring*, 210 Wis. 467, 470, 246 N. W. 367; Re-

statement of Law of Contracts, secs. 513, 514, 515. In my opinion the proposed contract violates both these conditions of invalidity. The plaintiff could not do business as a contractor under the proposed contract without foregoing his right to labor in connection with his business, and if he gave up his business as a contractor his opportunity to work at his trade as a layer of tile would be diminished or destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile layer. It is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile. It is without dispute that the plaintiff was a competent plasterer before he took up the trade of laying tile and it is without dispute that he is now a competent tile layer. The unreasonableness of the requirement of apprenticeship ties up with the unreasonableness of the restriction of the plaintiff's right to follow his chosen occupation of a title layer and as a contractor of tile jobs.

The requirement that the plaintiff sign the contract proposed is an unreasonable requirement, in my opinion, for the protection of the defendants against the competition of the plaintiff, and it certainly is unreasonable in imposing such a hardship upon him as it does impose. Such contracts as the instant one are invalid because they tend "to deprive the public of the services of persons in those capacities in which they are most useful and also tend to expose the public to the evils of monopoly." *Tecktonius* v. *Scott*, 110 Wis. 441, 449, 86 N. W. 672.

While the above is sufficient in my opinion to require reversal of the judgment herein and the granting of an injunction, I wish to say further that in the instant case, however it may be in the *American Furniture Co.* case, *supra*, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law. The Vth Amendment to the Constitution of the United States declares that no person shall be so deprived. If no person shall be so deprived, then no person shall so deprive him. Injury to business is deprivation of property. *Truax* v. *Corrigan*, 257 U. S. 312. To deprive one of his right to labor

is to deprive him of his liberty. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 41 L. Ed. 832. Under the facts of the case the picketing involved injures the plaintiff's business, deprives him of opportunity to labor, and inflicts irreparable injury upon him for which he has no adequate remedy at law. Hence the picketing should be enjoined, unless the injury resulting to the plaintiff from it is effected through due process of law.

> "The right to follow any of the common occupations of life is an inalienable right • • • It is a large ingredient in the civil liberty of the citizen. • • • The right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

Butchers' Union Co. v. *Crescent City*, 111 U. S. 746, 762, 764, 765. The liberty mentioned in the Vth as well as the XIVth Amendment "means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* case, *supra*. As quoted in *Cameron* v. *International Alliance T. S. E.*, 118 N. J. Eq. 11, 176 Atl. 692:

> " 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.' "

And in *Erdman* v. *Mitchell*, 207 Pa. 79, 56 Atl. 327, it is said:

> "The right of a workman to the 'free use of his hands' has been described as one 'of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the

bounden duty of the courts to protect.' 'A man may not barter away his life or his freedom or his substantial rights.' *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. Ed. 365."

These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so valuable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no "due process" by which the result is produced. The plaintiff is a man of family with no means of support except his labor. He is making a living for himself and family by laboring as a tile layer and contracting for small jobs of tile laying to provide opportunity for so laboring. He employs "helpers" on occasion, and occasionally employs "journeymen" tile layers to help him. He is willing to employ none but members of the defendant labor union to aid him. He is willing to join the defendant union if it will receive him. He will pay the union scale of wages and conform to union hours. The only provision of the proposed contract to which he will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure

his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued, with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition and, as it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen tile layers who shall aspire to become contractors, with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union. Business in contracting for such work as tile laying ordinarily begins with small beginnings, and if successful gradually extends to more considerable proportions. The plaintiff's road to success in such business is blocked, and the entry into such business is blocked to every worker, by the requirement of the defendants to which plaintiff objects. The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as non-union, from entering the contracting business unless he has or is able to procure capital otherwise not necessary for entry into and prosecution of the business to success. I cannot believe that such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions. The view here expressed of right to an injunction under the situation here involved has the support of the only courts that have ever passed on situations closely similar. *Roraback* v. *Motion Picture Machine Operators' Union*, 140 Minn. 481, 169 N. W. 529; *Hughes et al v. Kansas City Motion Pictures M. O. Local No. 170 et al.*, 282 Mo. 304, 221 S. W. 94; *Parker Paint & Wall Paper Co.* v. *Local Union No. 813, et al.*, 105 S. W. (Va.) 911; 16 A. L. R. 222. The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of

the individual citizen secured to him by the Constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that constitution. My concept of the inherent rights of man under the constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.

The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his job if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to "beat him up" every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect. As said in *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (NS) 874:

> "The law, therefore, recognizes the right of the workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights,

and appealing to the preventative powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

As to the peacefully picketing declared lawful by the code, whether or not it may be declared lawful in furtherance of a strike of employees, it passes the bounds of reasonableness to say it may be used to coerce one into refraining from working with his hands and the tools of his trade or following his chosen calling or making contracts in the prosecution of his business. No court has ever yet squarely held that picketing, peaceful or otherwise, is lawful except in aid of a strike. The case of *Exchange Bakery & Restaurant Co.* v. *Rifkin*, 245 N. Y. 260, does hold, in effect, that peaceful picketing is aid of a strike is lawful. Other cases so hold or imply. In the Rifkin Case, supra, only three employees struck. The rest stuck to their jobs. It is stated in effect in the opinion in the *American Furniture Co.* case, *supra*, that, if as held in the *Rifkin* case peaceful picketing by a union may be enjoined when only three employees are striking, it may be where no employees are striking and where there is no strike at all. This does not follow. In *American Steel Foundries* v. *Tri-City Trades Council*, 257 U. S. 184, a labor union was prosecuting a strike. Only two employees were shown to have participated in picketing in aid of it. The judgment enjoined all picketing by any of the defendants but the injunction, while upheld as to the other defendants, was so modified as to these two as to permit them to use "persuasion" to induce employees to quit work. The *Tri-City* case was under the Clayton Act, but it plainly declares that striking employees may have rights that non-strikers do not have, and that an injunction may issue against the latter that will not issue against the former.

That peaceful picketing is not made lawful in every controversy growing out of a labor dispute by the declaration of the code may, I think, be clearly shown by a few hypothetical cases. Suppose there is a strike of W.P.A. workers and they come to the capitol city in a great horde. They demand of the State Administrator that he increase

their wages. This he is powerless to do. They make like demand upon the Governor of the state and he also is powerless to meet their demand. They then post pickets to patrol the sidewalk in front of the State Administrator's house bearing placards denouncing the administrator as unfair to labor although "fairly stating" "the essential facts of the labor dispute" and not bearing any misstatement of fact conformable in all respects to the placarding upheld by the judgment of the court herein. The annoyance is so offensive to the State Administrator and his family that he leaves his house with his family and lives in a hotel until the picketing subsides. Strikers post pickets to patrol the public halls of the capitol in front of the entrance to the Governor's offices bearing placards containing like denunciation of the Governor and like statements of the "essential facts of the dispute" without falsifying. Is this picketing lawful? Suppose the case of Mrs. Blank. She has a family of several small children. She requires help in the care of her children and the performance of her household duties. The family income cannot spare over $3.00 per week to devote to that purpose. A maid out of employment is willing and desires to render the required service for the proffered wage and accepts the employment. A labor union, the members or officers of which consider that $3.00 per week is not a sufficient wage, maintain pickets on the sidewalk in front of her home bearing placards calling attention to the fact that Mrs. Blank pays her maid only $3.00 per week and stating that she is "unfair to labor." Must Mrs. Blank and her husband submit to the annoyance and nuisance of this "peaceful picketing" week in and week out because a statute declares that peaceful picketing in labor disputes is lawful? These cases are not stated as presenting exact parallels to the instant case. They are stated as illustrating that all picketing is not lawful, although it falls within the statutory declaration. Whether it is lawful or not depends upon the instant situation involved.

> "The legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the XIVth Amendment is intended to preserve."
>
> *Truax* case, *supra*.

The defendants claim and base their claim of the validity of the defendant's acts upon the proposition that their demand is as stated in their briefs "a reasonably just one." It is of course fundamental that statutory provisions restricting the liberty and property of the citizen must be reasonable or they violate due process. They must bear a relation to the health, safety, good order or welfare of the public. The statute declaring peaceful picketing lawful bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order the tendency is to disserve rather than serve them. And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole. If this may be done a legislature could enact any statute whatsoever affecting the rights of the citizen under the claim that it serves the public welfare and it would be immune from attack as withholding due process. To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage of the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests.

The acts of the defendants here involved being in my opinion unlawful I see no need to discuss the question of the validity or invalidity of the injunctional provisions of the labor code.

I am authorized to state that Mr. Justice Nelson concurs in this opinion.

EXHIBIT "C".

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY CALENDAR 1936. AUGUST TERM, 1936.

No. 177.

PAUL SENN, *Appellant*,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, *et al.*, *Respondents.*

FAIRCHILD, *J.* (on motion for rehearing):

Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by secs. 268.18 to 268.29, Stats. 1933, now secs. 103.51 to 103.63, Stats. 1935, exists, that sec. 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and federal constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adversely to the contentions of plaintiff in the case of *American Furniture Co.* v. *I. B. of T. C. and H. of A. etc.*, decided at the same time.

By the Court—Motion for rehearing denied with $25 costs.